No. 14635

United States
Court of Appeals
For the Ninth Circuit.

NICK JOHN KALINE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—2-25-55

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

J. B. TIETZ,
257 S. Spring St.,
Los Angeles 12, Calif.

For Appellee:

LAUGHLIN E. WATERS,
United States Attorney;

LOUIS LEE ABBOTT,
CECILE HICKS, JR.,
Assistants U. S. Attorney,
600 Federal Bldg.,
Los Angeles 12, Calif.

In the United States District Court in and for the Southern District of California, Central Division

No. 23911 CD

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NICK JOHN KALINE,

Defendant.

INDICTMENT

[U.S.C., Title 50, App., Sec. 462—Universal Military Training and Service Act]

The grand jury charges:

Defendant Nick John Kaline, a male person within the class made subject to selective service under the Universal Military Training and Service Act, registered as required by said act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 110, said board being then and there duly created and acting, under the Selective Service System established by said act, in Los Angeles County, California, in the Central Division of the Southern District of California; pursuant to said act and the regulations promulgated thereunder, the defendant was classified in Class I-A-O and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the armed forces of the United States of America, on May 26,

1954, in Los Angeles County, California, in the division and district aforesaid; and at said time and place the defendant did knowingly fail and neglect to perform a duty required of him under said act and the regulations promulgated thereunder in that he then and [2*] there knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do.

A True Bill,

/s/ W. H. REPLOGLE,
Foreman.

/s/ LAUGHLIN E. WATERS,
United States Attorney.

Bond fixed in the amount of .....

[Endorsed]: Filed November 3, 1954. [3]

[Title of District Court and Cause.]

MINUTES OF THE COURT—NOV. 15, 1954

Present: Hon: James M. Carter,
District Judge.

U. S. Att'y., by Ass't. U. S. Att'y.: Bruce A. Bevan.

Counsel for Defendant: J. B. Tietz.

Defendant is present (on bond).

*Page numbering appearing at foot of page of original Certified Transcript of Record.

Proceedings:

For Arr. and Plea.

Defendant is arraigned and enters a plea of Not Guilty.

It Is Ordered case set for trial, with a Jury, for November 23, 1954, at 10 a.m.

EDMUND L. SMITH,
Clerk.

By L. B. FIGG,
Deputy Clerk. [4]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between the United States of America, Plaintiff, and Nick John Kaline, Defendant, in the above-entitled matter, through their respective counsel, as follows:

That it be deemed that the Clerk of Local Board No. 110 was called, sworn and testified that:

1. She is a clerk employed by the Selective Service System of the United States Government.

2. The defendant, Nick John Kaline, is a registrant of Local Board No. 110.

3. As Clerk of Local Board No. 110, she is legal custodian of the original Selective Service file of Nick John Kaline.

4. The Selective Service file of Nick John Kaline is a record kept in the normal course of business by Local Board No. 110, and it is the normal course of Local Board No. 110's business to keep such [5] records.

It Is Further Stipulated that a photostatic copy of the original Selective Service file of Nick John Kaline, marked "Government's Exhibit 2" for identification, is a true and accurate copy of the contents of the original Selective Service file on Nick John Kaline.

It Is Further Stipulated that a photostatic copy of the Selective Service file of Nick John Kaline, marked "Government's Exhibit 2" for identification, may be introduced in evidence in lieu of the original Selective Service file of Nick John Kaline.

Dated this 23rd day of November, 1954.

LAUGHLIN E. WATERS,
United States Attorney;

LOUIS LEE ABBOTT,
Ass't. United States Attorney,
Chief of Criminal Division;

/s/ MANUEL L. REAL,
Assistant U. S. Attorney,
Attorneys for Plaintiff.

/s/ J. B. TIETZ,
Attorney for Defendant.

/s/ NICK JOHN KALINE,
Defendant.

It Is So Ordered this 23rd day of November, 1954.

/s/ JAMES M. CARTER,
United States District Judge.

[Endorsed]: Filed November 23, 1954. [6]

[Title of District Court and Cause.]

MOTION FOR JUDGMENT OF ACQUITTAL

May It Please the Court:

Now comes the defendant and moves the Court for a judgment of acquittal for each and every one of the following reasons:

1. There is no evidence to show that the defendant is guilty as charged in the indictment.

2. The Government has wholly failed to prove a violation of the Act and Regulations by the defendant as charged in the indictment.

3. The Hearing Officer of the Department of Justice abused his discretion when he failed to give defendant another opportunity for a hearing after defendant had promptly explained why he didn't appear on February 4, 1954, at 3:30 p.m., and after defendant had requested another opportunity to be heard by said Hearing Officer. [7]

4. The Selective Service System and/or the Department of Justice denied defendant due process of law in that he was not afforded a hearing before a Hearing Officer after February 4, 1954.

5. Defendant's liability for service was illegally extended beyond age twenty-six.

6. Defendant was illegally reclassified from Class I-O to Class I-A on November 20, 1952.

7. Defendant was illegally reclassified into Class I-A-O on December 19, 1952.

8. Defendant was illegally deprived of a Class IV-D exemption on February 17, 1949.

9. The Department of Justice deprived defendant of his right to a fair and correct recommendation to the Appeal Board in that the Department's recommendation was based on artificial and illegal considerations.

10. The undisputed evidence shows that the defendant was deprived of a fair hearing before the hearing officer of the Department of Justice in that the conclusions of both the Hearing Officer and the Attorney General are inconsistent with and not supported by the findings of fact.

11. Defendant was denied procedural due process in that the local board failed to have available an Advisor to Registrants and to have posted conspicuously or any place, the names and addresses of such adviser, as required by the Regulations, and to defendant's prejudice.

12. The failure of the Court to compel the production of the F.B.I. investigative report and the report of the Hearing Officer to the Attorney General and the order of the Court sustaining the motion to quash the subpoena duces tecum made by the Government, constitute a deprivation of the defendant's rights to due process of law upon criminal trials contrary [8] to the Fifth Amendment to the United States Constitution and the right to confrontation guaranteed by the Sixth Amendment, and also

violate the statutes and rules of the Court providing for the issuance of subpoenas in behalf of defendants in criminal cases.

13. The denial of the conscientious objector status by the Selective Service System and the recommendation by the Hearing Officer of the Department of Justice and by the Department of Justice to the board of appeal were without basis in fact, arbitrary, capricious and contrary to law.

/s/ J. B. TIETZ,
Attorney for the Defendant.

Clerk—File nunc pro tunc as of date of trial.

/s/ JAMES M. CARTER,
District Judge.

12/21/54.

Nunc pro tunc filed November 23, 1954.

[Endorsed]: Filed December 21, 1954. [9]

[Title of District Court and Cause.]

MINUTES OF THE COURT—DEC. 13, 1954

Present: Hon. James M. Carter,
District Judge.

U. S. Att'y., by Ass't. U. S. Att'y.: Cecil Hicks, Jr.

Counsel for Defendant: J. B. Tietz.

Defendant present (on bond).

Proceedings:

For further trial proceedings after submission of the cause.

Attorney Tietz argues for defendant.

Court Finds defendant guilty as charged and waives report by Probation Officer, and Orders cause continued to 2 p.m., December 20, 1954, for sentence, and that defendant may remain on bond pending sentence.

EDMUND L. SMITH,
Clerk.

By L. B. FIGG,
Deputy Clerk. [10]

[Title of District Court and Cause.]

RENEWAL OF MOTION FOR JUDGMENT OF ACQUITTAL AND, IN THE ALTERNATIVE, MOTION FOR NEW TRIAL

The defendant moves the Court for a judgment of acquittal upon the same grounds heretofore urged and, in the alternative to grant him a new trial for the following reasons:

1. The Court erred in denying defendant's motion for acquittal made at the conclusion of all the evidence.

2. The verdict is contrary to the weight of the evidence.

3. The verdict is not supported by substantial evidence.

/s/ J. B. TIETZ,
Attorney for Defendant.

Dated at Los Angeles: December 17, 1954.

Affidavit of service by mail attached.

[Endorsed]: Filed December 16, 1954. [11]

[Title of District Court and Cause.]

MINUTES OF THE COURT—DEC. 20, 1954

Present: Hon. James M. Carter,
District Judge.

U. S. Att'y., by Ass't. U. S. Att'y.: Cecil Hicks, Jr.

Counsel for Defendant: J. B. Tietz.

Defendant present (on bond).

Proceedings:

For (1) hearing on renewed motion of defendant, filed Dec. 16, 1954, for judgment of acquittal or for new trial;

(2) Sentencing (upon a finding of guilty).

Attorney Tietz argues motions.

It Is Ordered that defendant's motions for judgment of acquittal and new trial are denied.

Court Sentences defendant to four years' imprisonment for offense charged in Indictment.

Defendant files notice of appeal and an application for bail pending determination of appeal, and It Is Ordered that application for said bail is denied.

Defendant moves for stay of execution, and It Is Ordered that said motion is denied. It Is Further Ordered that defendant is remanded to custody and his bond exonerated.

EDMUND L. SMITH,
Clerk.

By L. B. FIGG,
Deputy Clerk. [13]

United States District Court for the Southern District of California, Central Division

No. 23911-Criminal

UNITED STATES OF AMERICA,

vs.

NICK JOHN KALINE

JUDGMENT AND COMMITMENT

On this 20th day of December, 1954, came the attorney for the government and the defendant appeared in person and by counsel, J. B. Tietz:

It Is Adjudged that the defendant has been con-

victed upon his plea of not guilty and a finding of guilty of the offense of failing and neglecting to perform a duty required of him under the Universal Military Training and Service Act and the regulations thereunder, in that he failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do, in violation of 50 U.S. Code, App., Sec. 462; as charged in the Indictment; and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four years.

It Is Adjudged that defendant is remanded to custody and his bond exonerated.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ JAMES M. CARTER,
United States District Judge.

[Endorsed]: Filed December 20, 1954. [14]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Appellant, Nick John Kaline, resides at 2000 Laguna Drive, La Habra, California.

Appellant's attorney, J. B. Tietz, maintains his office at 534 Douglas Building, 257 South Spring Street, Los Angeles 12, California.

The offense was failing to submit to induction, U.S.C., Title 50 App. Sec 462—Selective Service Act, 1948, as amended.

On December 20, 1954, after a verdict of Guilty, the Court sentenced the appellant to confinement in an institution to be selected by the Attorney General for

I, J. B. Tietz, appellant's attorney being authorized by him to perfect an appeal, do hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

/s/ J. B. TIETZ,
Attorney for Appellant.

[Endorsed]: Filed December 20, 1954. [15]

In the United States District Court, Southern District of California, Central Division

No. 23911-Criminal

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NICK JOHN KALINE,

Defendant.

Honorable James M. Carter, Judge Presiding.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Appearances:

For the Plaintiff:

LAUGHLIN E. WATERS,
United States Attorney, By
MANUEL REAL,
Assistant United States Attorney.

For the Defendant:

J. B. TIETZ, Esq.

Tuesday, November 23, 1954, 10 A.M.

(Other Court matters.)

The Clerk: No. 23911 Criminal, United States vs. Nick John Kaline.

Mr. Tietz: Ready for the defendant. The defendant is in Court.

Mr. Real: Ready for the Government.

In this case there is a preliminary matter for consideration, your Honor. As I told you this morning, the special agent in charge of the Federal Bureau of Investigation, Los Angeles office, was served yesterday afternoon with a subpoena duces tecum, and the office of the United States Attorney was also served with a subpoena duces tecum, to be in Court and to present or to have ready for presentation the secret recommendation of the Hearing Officer to the Department of Justice and the complete secret investigative report made by the FBI agents and/or others in the investigation of the conscientious objector claim made by the defendant and submitted to the Hearing Officer of the Department of Justice, considered by him and relied upon by him in making his report to the Department, and relied upon by the Attorney General in his recommendation to the Appeal Board of the Selective Service System. And also the correspondence between defendant and the Hearing Officer of February, 1954, on the subject [2*] of a resetting of the hearing date.

Also subpoenaed was the hearing officer Homer D. Crotty, and Lt. Col. Francis A. Heartwell.

The motion of the Government in this respect, your Honor, is that the subpoena duces tecum be quashed as to the secret recommendation of the Hearing Officer, what is termed secret recommenda-

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

tion of the Hearing Officer, and the investigative reports made by the Federal Bureau of Investigation, on the authority of the case of United States vs. Nugent, and also the provision 3229 of the Attorney General, which provides that those are confidential records and are not to be disclosed.

These matters have been considered in a great many cases, in fact, in practically every one of the cases that came up prior to the decision in Tomlinson and White, and have been, except for the appearances before Judge Mathes, quashed in every case.

I think I am right. Is that correct, Mr. Tietz?

Mr. Tietz: Locally, yes.

Mr. Real: In this district, yes.

The Court: Except in what cases?

Mr. Real: Except in the cases that were before Judge Mathes. And Judge Mathes established a procedure in the cases that were before him, Selective Service cases, of making an in camera inspection of the reports. However, the decision [3] of Judge Mathes was prior to the decision in the case of United States vs. Nugent. And since that decision has come down from the Supreme Court, it has been the view in this district, at least of the judges who have considered Selective Service cases since the Nugent case, that the motion to quash would lie.

The Court: Let me see the file.

Mr. Tietz, what is your view on the matter?

Mr. Tietz: The point we make in this case is the point that arose after the Nugent case, and it is based in part on the Nugent case, and the point

briefly is this: The Attorney General——

The Court: Where is the motion? Is it in here?

Mr. Real: As I told you this morning, it is an oral motion, since we were served yesterday afternoon and haven't had an opportunity to get it in writing.

The Court: Where is the subpoena?

Mr. Real: I have a copy here, if I may hand it up.

The Clerk: Do you have the original, Mr. Tietz, with the return on it?

Mr. Tietz: No. But evidently it has been served.

The Court: May I use the copy, Mr. Tietz?

Mr. Tietz: Yes. The copy is an exact copy of the original.

The Court: What is your point? [4]

Mr. Tietz: After the Nugent case, the Attorney General saw the light and adopted a procedure, adopted regulations — that is important, that he adopted regulations, too, but he adopted a procedure whereby every registrant professing to be a conscientious objector, who took an administrative appeal, was to receive, just before the Hearing Officer hearing, a few days before the Hearing Officer hearing, a resume, that is what they call it, a resume of the FBI investigative report, so when he came before the Hearing Officer he would know something of what the Hearing Officer had in the back of his head and know something about any of the bad things that were said against him and have a chance to meet them.

Now, my point here is this: How are we to know,

how is your Honor to know, that that resume is a fair one, even that it is an honest one, unless at least your Honor, as Judge Mathes did, makes an in camera inspection of the FBI reports? They are here now, and before your Honor can tell whether or not this resume, which we are going to present in evidence when we get into this case, which is in the file, I believe—how could your Honor tell it is a fair one unless your Honor sees the original FBI report?

The Court: Well, the Nugent case, as explained in the White case—wasn't it White?

Mr. Real: That is correct, your Honor. [5]

The Court (Continuing): Pretty well disposed of that. They pointed out the cases in Nugent which the Supreme Court relied upon, the kind of cases they were, and what the defendant got, and they pointed out that the defendant wasn't entitled to a complete examination, nor was it to be a sham, it was to be midway, and this resume would seem to be that. Isn't this the same situation that has been overruled by judges in this Court since the Nugent case?

Mr. Tietz: I have two answers to that.

First, the White case isn't permanent. Petition for a writ of certiorari has been filed. That is one thing.

In the second place, the White case in my opinion doesn't cover the present situation, because regulations have been adopted since, and there has been a change.

I have before me the slip opinion of the White

case. On page 10 the Court says: In other words, that is the way the Department did it. We find nothing in the opinion to indicate that the Supreme Court considered that the summary thus referred to was required by statute or the demands of due process.

Now, my point is that since then, since the processing of White, and since the Nugent case, the Attorney General has adopted regulations for his hearing officers. Now, remember, although the Nugent case refers to a resume, that was all in prospect, the Supreme Court, when it used that [6] language, didn't have before it any such thing as a resume. The Supreme Court meant—because there was no such thing before them—meant that fair dealing required that the registrant get such a thing. And immediately the Attorney General started a procedure, and in a few months he had it in effect, whereby a resume was given.

Now, the procedure back in the time of Nugent was this—somewhat similar but vastly different in principle: The hearing officers sent out, much as they do now, a three-page mimeographed notice to the registrant telling him to come, telling him that he can bring with him friends, that he can bring an attorney, this, that, and the other, it is informal. Now, in the version that has been used for the last several years, just before the Nugent case, not only in effect, but the last several years that version said to the registrant, if you want to know in advance of the hearing if there was any adverse information

dug up by the FBI against you, you call me up and I will let you know.

Now, that is what the Supreme Court had in mind as being or meeting a fair process. But it went further and they said he should get a resume. So, to repeat partially, the Attorney General saw the light and immediately set in motion machinery which now is in full effect, which gives every one of these fellows a typewritten resume of everything of materiality that was dug up against them. [7]

The Court: Doesn't the Attorney General's regulation go further than the factual situation in the Nugent case? Doesn't the man now get more than the Court found sufficient in the Nugent case?

Mr. Tietz: Yes, yes. But how are we to know that this resume is an honest one or is a fair one, unless we can compare it against something? Do we have to take their word?

The Court: How could you know, in the Nugent case, when the registrant called up the Hearing Officer, that the Hearing Officer gave him a fair report?

Mr. Tietz: In that case the point did not arise for two reasons. That is a peculiar thing, it was almost a moot decision. When you read the case, and especially footnote 10, there were two appellants joined, Nugent and Packard. As far as Nugent was concerned, the Court said he is not entitled to it because he didn't ask. He was told he could ask and he didn't ask. As far as Packard, the Court says this doesn't apply to him, because there is not one scintilla of adverse evidence.

When you have a situation where the fellow is pure as the driven snow, there is no whisper of any kind against him, this doesn't apply; but where, as in this case, we have people saying some things which do not reflect completely in his favor, then we have the situation where Judge Mathes said, "I am going to look at this." [8]

I think the first thing your Honor should do is to say, "I will look at this in camera, as Judge Mathes did, and see whether or not the resume that is in the file is a fair and an honest one."

The Court: You mean you would place on the Court the duty of going through these FBI files and making the comparison to see whether the resume was fair?

Mr. Tietz: How else would the Court know whether or not our point is good, when we say this resume is unfair?

The Court: If you are going to do that, you might as well change all the regulations and let the judges try the cases de novo.

Mr. Tietz: In part they have to. Any time any one of these registrants comes in and says, "At the personal appearance they called me a yellow so-and-so," that isn't in the file and that evidence has to be gone into.

I have had cases where language like that was used. That may take a whole afternoon of testimony. And Mr. Real and I have had cases where Mr. Real called the board in a week later to rebut it.

You can't confine it to the file itself. There are many elements in these cases.

The Court: All right. Mr. Real, what is your answer to this argument?

Mr. Real: Your Honor, I think the answer is in the White [9] case, where Judge Pope has adopted the theory, and certainly the reasoning, that it would be an almost incongruous situation where the Supreme Court would say on the one hand that you need not put in the FBI reports, and they need not be introduced in evidence, they are of no value, they are certainly of no evidentiary value in a case, and then on the other hand make a decision which opens up the door to the very fact that they were denying in the Nugent case the reports to come into evidence. It would be an incongruous situation if the Supreme Court would have in mind closing one door and opening the other door at the rear where the same thing could be accomplished.

I think certainly the language in the Nugent case, and the language in the White case, indicates that the confidential nature of an FBI report, of the investigative techniques, certainly outweighs the evidentiary value that they might have in a situation of this nature.

They are of no evidentiary value.

The Appeal Board who makes the final determination does not see them. There is nobody that sees them. The defendant has given to him what he must rebut.

We have one further fact in this case that is certainly going to be raised, that the defendant did not appear before the Hearing Officer, and therefore I don't see how under any conceivable theory he can

say that he was prejudiced by a [10] refusal or a denial to see the reports.

The Court: Can that fact be stipulated to here at this time?

Mr. Tietz: Yes.

The Court: That the defendant did not appear?

Mr. Tietz: Is is in the file.

The Court: But the file isn't before me on this motion. For the purpose of this motion can it be stipulated that the defendant did not appear before the Hearing Officer?

Mr. Tietz: Yes. There are extenuating circumstances, which we will go into later, but for the purpose of this motion he did not appear.

The Court: It may be so stipulated?

Mr. Real: It may be so stipulated.

The Court: Is that correct, Mr. Tietz?

Mr. Tietz: Yes, correct.

The Court: Do you consider the White case adverse to your position, Mr. Tietz?

Mr. Tietz: Yes, I do. My first position is on the petition for certiorari. And my second point is that it is not adverse since Clair LaVerne White was processed.

The Court: All right. The subpoena duces tecum —it looks like a subpoena duces tecum to all of these four people.

Mr. Real: Your Honor, as to the hearing Officer Mr. [11] Crotty, there is some information that is probably relevant.

The Court: This looks like a subpoena duces tecum to all of these people.

Mr. Real: To present all of those items, yes, your Honor.

I think it should be quashed as to the special agent of the Federal Bureau of Investigation, as to the United States Attorney, and as to Col. Heartwell. And we have here—and I think Mr. Tietz has gone along with us—that I have all of the correspondence between the defendant and the hearing officer, and that that will be sufficient, that Mr. Crotty need not appear, that all he wanted was the correspondence.

The Court: You don't get my point yet. It is a technical point. Actually, this is drawn up not as a personal subpoena to these individuals, it is drawn up apparently as a subpoena duces tecum to each of them. As a subpoena duces tecum it requires two things: One, that they come; two, that they bring the document.

Mr. Real: That is correct.

The Court: Therefore, you have involved, really, a subpoena duces tecum and a subpoena.

I think they should be quashed as to all of them, unless you want to except Crotty from it, as a subpoena duces tecum. Now, is there any angle involved requiring the personal [12] appearance of Crotty here?

Mr. Real: I think, your Honor, that Mr. Tietz and I can stipulate that I have all of the correspondence between the defendant and Mr. Crotty, and that is what Mr. Tietz wanted, and we have that.

The Court: Can you so stipulate, Mr. Tietz?

Mr. Tietz: Yes.

The Court: And it will be available, Mr. Real?

Mr. Real: Yes, it will be available. I have it right here.

The Court: Then, as far as Homer D. Crotty is concerned, you have no objection to the Court granting the motion to quash?

Mr. Tietz: Let us see if we understand what we are stipulating to.

I believe I am stipulating that if Mr. Crotty were here in person he would testify that these are the original letters he received from the defendant and carbon copies of letters that he personally sent to the defendant.

The Court: Right. By "these" let's make the record clear and mark them Exhibit 1 at this time. This series will be Exhibit 1 for the purpose of this motion. We can also let it have the same number in the trial. Therefore, in view of your statement, which Mr. Real accepts, you have no objection to quashing the subpoena against Homer Crotty? [13]

Mr. Tietz: No.

The Court: All right. Subpoena quashed, then, as to all four.

Mr. Tietz: What about Heartwell, for one thing?

The Court: Did you want him personally?

Mr. Tietz: We have Col. Keeley here as his deputy, in a sense, to testify to something which is pertinent to the case, just as we did in the preceding case.

The Court: Is Mr. Keeley going to be satisfactory, in lieu of Mr. Heartwell?

Mr. Tietz: Oh, yes, yes.

The Court: That raises the question of the indi-

vidual effect of the subpoena duces tecum. I am merely quashing all of the subpoenas duces tecum in view of the stipulation arrived at as to Crotty.

You also indicate that you want the subpoena as to Heartwell treated as an individual subpoena.

Mr. Tietz: Correct.

The Court: He has not come, but Mr. Keeley has come; is that satisfactory to you?

Mr. Tietz: Yes.

The Court: Then there is nothing further to do.

Mr. Real: Mr. McCully is here in lieu of Mr. Malone, who is the special agent in charge. I think the subpoena part of that should also be quashed as to Mr. Malone and [14] his deputy, since I don't think there is any testimony that will be elicited from either Mr. McCully or Mr. Malone. Is that correct, Mr. Tietz?

Mr. Tietz: Other than that it is based on the quashing of a subpoena.

The Court: All right. You are excused, Mr. McCully.

All right. Now, let's go ahead.

Mr. Real: Your Honor, I have here a photostatic copy of the Selective Service file of Nick John Kaline. I ask that it be marked as Government's Exhibit 2 for identification.

The Court: We will mark it as 2.

(The document referred to was marked Plaintiff's Exhibit 2, for identification.)

Mr. Real: I have here a stipulation entered into between the Government and the defendant Nick

John Kaline, signed by the defendant himself, by J. B. Tietz, his counsel, and myself on behalf of the Government, and I ask leave to file the stipulation.

The Court: The stipulation will be approved, and Exhibit 2 will be received in evidence pursuant to the stipulation.

(The document referred to, marked Plaintiff's Exhibit 2, for identification, was received in evidence.)

Mr. Real: The Government rests, your Honor.

Mr. Tietz: The defendant desires to reserve making his [15] motion on the points that are based solely on the Government's file, the Government's evidence, to the end of the case, and the defendant would like to proceed and put on his affirmative defenses.

Col. Keeley, will you please take the stand?

The Court: Mr. Tietz, will you make an opening statement and tell me what your points are in this case so I may have them in mind as we go along?

Mr. Tietz: One point which we expect to establish by Col. Keeley is that there was no hearing officer in the Department of Justice, and that, in connection with the facts of this case, consisted of a denial of due process.

The FBI point has already been disposed of. The Court has taken a position on it.

The no-basis-in-fact point will be strongly urged here. That is the Dickinson case.

We have two points in connection with the Hearing Officer hearing, and one is that the Department

of Justice deprived defendant of his right to a fair and correct recommendation of the Appeal Board in that the Department's recommendation is based on artificial and illegal considerations; and the other is that the undisputed evidence will show that the defendant was deprived of a fair hearing before the Hearing Officer of the Department of Justice, and the conclusions of both the Hearing Officer and the Attorney General are [16] inconsistent with and not supported by the findings of fact.

Now, there are other points in connection with that that I could recite to your Honor, and they are as follows: The Hearing Officer of the Department of Justice abused his discretion when he failed to give defendant another opportunity for a hearing after the defendant had promptly explained why he didn't appear on February 4, 1954, at 3:30 p.m., and after defendant had requested another opportunity to be heard by said Hearing Officer.

And a point in connection with that, but separate, is that the Selective Service system and/or the Department of Justice denied defendant due process of law in that he was not afforded a hearing before a Hearing Officer after February 4, 1954.

I might as well state all my points, so your Honor will know what I am aiming at altogether.

Another point is that the defendant's liability for service was illegally extended beyond age 26.

Another point. Defendant was illegally reclassified from class I-O to class I-A on November 20, 1952. Another point. That he was illegally reclassi-

fied into class I-A-O on December 19, 1952. And, another: That he was illegally deprived of a class IV-D exemption on February 17, 1949.

Most of these points, almost all of them, depend solely on the Government's own exhibit. Two or three will depend [17] in part at least on testimony.

The Court: Proceed.

Mr. Tietz: Colonel, will you please take the stand?

ELIAS M. KEELEY

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Elias M. Keeley, K-e-e-l-e-y.

Direct Examination

By Mr. Tietz:

Q. What is your position with Selective Service, Colonel?

A. I am district co-ordinator of District No. 5, which takes in all this area here in Southern California.

Q. Do you have occasion to visit the offices of the Local Boards? A. I do.

Q. Have you had occasion to visit the office of Board 110 at any time since 1950 to the present?

A. I have.

Q. And you are familiar with the bulletin board of that cluster of boards where Board 110 is?

A. I am. [18]

(Testimony of Elias M. Keeley.)

Q. What is that cluster called? Group what?

A. Group D.

Q. How many boards does it have there?

A. I think there are six.

Q. That is the maximum number in any cluster of boards in Los Angeles County, is it not?

A. That is correct.

Q. At any time from 1950 to the present, has this board ever had an advisor to registrants?

A. It has had a Government appeal agent. Is that what you mean?

Q. Oh, no. You are familiar, I am sure, Colonel, with the regulations, particularly Section 1604.41, labeled in big, bold letters, Advisors to Registrants?

A. I am.

Q. Now, that is what I mean. Do they have such a functionary?

A. We do not. That provision provides that in the event you do have advisors under that section, then they should be posted. But where you have other persons who take the place of the advisors, you do not have the technical name, Selective Service Advisor, then it is not necessary that they be posted.

Q. No posting, then?

A. That is correct. [19]

Mr. Tietz: You may cross-examine.

Mr. Real: No cross-examination.

Mr. Tietz: May the Colonel be excused, your Honor? The defendant has no further use for him.

The Court: You may be excused, Colonel.

The Defendant: I will affrm.

NICK JOHN KALINE

the defendant herein, called as a witness in his own behalf, duly affirmed to tell the truth, the whole truth, and nothing but the truth under the pains and penalties of perjury:

The Clerk: What is your name, please?

The Witness: Nick John Kaline.

Direct Examination

By Mr. Tietz:

Q. You are the defendant in this case, are you not? A. Yes.

Q. Did you ever get a notification to come before a Hearing Officer of the Department of Justice, a Mr. Crotty? A. Yes, I did.

Q. When did you get that notice?

A. The day I received it was about two or three days after the date of the hearing.

Q. What did you do when you received it? [20]

A. I wrote in within a few days. I consulted my minister, Jack Green, who is in the room, as to what I should do, and he recommended writing in and asking for another hearing, which I did.

The Court: Where does that appear in the file?

The Witness: It is not in the file, I don't think.

The Court: Well, your letter would be.

Mr. Tietz: I had these marked, your Honor, but I just don't have that sheet right in front of me. Pages 38 to 47 cover the chronology of this particular event. Well, I am wrong. Thirty-eight starts with his address before.

(Testimony of Nick John Kaline.)

I am sorry, your Honor.

What was your last answer?

The Witness: I wrote in for another hearing.

Mr. Tietz: May I call on Mr. Real, pursuant to our stipulation, to hand me the correspondence which Mr. Homer Crotty, Hearing Officer of the Department of Justice, sent in? That is known as Exhibit 1?

Mr. Real: That is correct.

The Court: You wrote to the Hearing Officer, not to the draft board?

The Witness: The Hearing Officer, yes.

The Court: All right.

Mr. Tietz: That explains why none of this is in the file, your Honor, because that is Department of Justice material. [21]

Q. (By Mr. Tietz): I am going to put before you a number of sheets of paper, some original letters from Mr. T. Oscar Smith to Mr. Crotty, some carbon copies of Mr. Crotty's letters, others—here is a letter apparently signed by you. Will you look at those, please, and tell us—let me see, are they marked?

The Court: Can't we stipulate that this is the correspondence file of Crotty's office, Mr. Crotty, and the letters signed by Kaline were written by him, and the copies of letters to Kaline were written to him by Crotty, and so forth?

Mr. Real: It may be so stipulated, your Honor.

Mr. Tietz: Yes.

The Court: Let me see them.

(Testimony of Nick John Kaline.)

Mr. Tietz: Will you hand the entire file, Exhibit 1, to the Court?

The Court: Can it be stipulated that the letter from T. Oscar Smith is from an official of the Department of Justice to Homer Crotty, is that right?

Mr. Real: Yes, your Honor, it is so stipulated.

Mr. Tietz: Yes.

The Court: All right.

Q. (By Mr. Tietz): About this time you advised the Local Board by writing to them that you had moved, did you not? A. Yes, I did.

The Court: What page is that? [22]

Mr. Tietz: Pages 43 and 44, your Honor.

The Court: You say "about this time"?

Mr. Tietz: It is dated February 15th.

The Court: Yes, but the dates in the file, Exhibit 1 for identification, indicate that there had been a hearing set for January 21, '54.

Mr. Tietz: Oh, no, your Honor. February something, February 4th.

The Court: The first sheet seems to indicate there had been one set for January 21st.

Mr. Tietz: That may be, and they weren't sure of his address.

The Court: Pardon me. Strike that out. It shows a hearing had been set for February 4th, 1954.

Mr. Tietz: Yes, sir.

The Court: Which is some 11 days prior to this change of address that you refer to.

Mr. Tietz: Yes.

(Testimony of Nick John Kaline.)

The Court: All right.

Q. (By Mr. Tietz): Why didn't you get the notice from Mr. Crotty before you did?

A. Well, I maintain it was my fault because I put the responsibility in my sister's hands, something I shouldn't have done.

Q. What was that? [23]

A. That is, I had moved, and where I was staying, I was single then, where I was staying I knew I wouldn't be there too long, I wasn't happy there, so, rather than go change my driver's license, notify the draft board, and notify every other place of a change of address, I told her that if I had any legal matters, anything of importance, please call me at such and such number.

She called me, but it was about two or three days later, and therefore I say it was my fault, and hers.

Mr. Tietz: I would like to ask a question of this defendant, as I did in the preceding case, your Honor, that goes to his conscientious objections, and I would like to have the same point present in this case.

The Court: You mean the fact that he didn't have an attorney, a trial de novo, and all that business?

Mr. Tietz: Yes.

The Court: Ask your questions.

Mr. Tietz: May it be stipulated that the same point is raised, the same ruling, or shall I ask——

The Court: Ask your preliminary questions about a lawyer.

(Testimony of Nick John Kaline.)

Q. (By Mr. Tietz): What are your conscientious objections to war?

Mr. Real: Your Honor, to which we will object as irrelevant and immaterial to the issues in the case. [24]

The Court: It will be sustained.

Mr. Tietz: If permitted to answer this——

The Court: Are you going to make any showing about a lawyer?

Mr. Tietz: No, I don't think I have to, your Honor. I am unable to do that.

The Court: Make your offer of proof.

Mr. Tietz: If permitted to answer, this witness would give in detail his religious background, his beliefs with respect to a Supreme Being, amplifying what he had placed in special form No. 150, up to his present views, and he would cover the matter of his beliefs with respect to the Supreme Being, with respect to his religious training, with respect to his beliefs.

The Court: In other words, you would want by this witness——

Mr. Tietz: De novo.

The Court: ——to try the question of his classification de novo in this Court?

Mr. Tietz: Yes, sir.

Mr. Real: To which we will object as irrelevant and immaterial.

The Court: Sustained, and the offer of proof is denied.

Mr. Tietz: You may cross-examine. [25]

(Testimony of Nick John Kaline.)

Cross-Examination

By Mr. Real:

Q. Mr. Kaline, did you ever make a request of the Local Board for assistance in the filling out of your questionnaire? A. Not that I recall.

Q. Or in the filling out of your special form for conscientious objector, that is the long form about your conscientious objection?

A. Not the draft board. My minister.

Q. You didn't ask the draft board for any assistance? A. No.

Q. I think you said that it was your own fault that you didn't notify the board of your change of address?

A. I take the blame is the way I put it.

Q. And that was because you had moved and had not notified them?

A. Yes. I placed the responsibility on someone else.

Mr. Real: I have nothing further, your Honor.

Mr. Tietz: That is our case, your Honor.

The Court: Step down. You are excused.

Mr. Tietz: I would like a fair amount of time to argue these points, because I think they are ones that can only be understood, as I think they should be understood, with enough argument on them. [26]

The first one I want to argue is that the Hearing Officer of the Department of Justice abused his discretion in not giving this defendant another opportunity——

The Court: I don't want to hear any argument on that. The Hearing Officer procedure is for the benefit of the defendant; if he wants to avail himself of it, he should keep the draft board familiar with his address.

Mr. Tietz: I have a few cases which are decisions of this very Court.

The Court: Do you want to file them in a brief?

Mr. Tietz: I can do that.

The Court: I don't think there is much to the point; I will read the point, but make it short.

What is your next point?

Mr. Tietz: In similar matters courts have held hearings of this sort given to the defendant are very important.

The Court: Sure, but what is the draft board to do? Take an extreme case. Suppose the draft board doesn't get this change of address, does the draft board have to go out and find him and bring him in before they can process his file?

Mr. Tietz: No. I think there must be a reasonable view of it. If he makes a diligent attempt, if he gets it in fairly promptly, he should have a chance to come before the Hearing Officer. [27]

When one looks at the file, you will see that even the draft board thought so, when you look at the file you will see that they started to give him another date. An inspection of the file will show that.

The Court: You set it forth in the brief.

What other point do you have?

Mr. Tietz: My next point is that he had his liability illegally extended beyond the age of 26.

Pages 7, 13, 14, 15 of the file tend to support my claim.

Your Honor is familiar with the regulation that says—it has always been a regulation—that a registrant should be classified in the lowest classification as to which he presents evidence.

It was evident that back in 1949 he presented evidence that at that time he was entitled to a 4-D ministerial student classification. He was full-time student in the Pacific Bible College. Now, instead of putting him in the 4-D exempt classification, they put him in the 4-F deferred classification, and that act extended his liability to the age of 35. If they had properly classified him as soon as——

The Court: Did he take an appeal from that?

Mr. Tietz: No. And my next point is that you can't take an appeal from a 4-F, and I will give the Court the regulations, and I will give the Court an interpretation of Selective Service itself on that. [28]

The Court: You had better develop this point in your brief, too.

Mr. Tietz: All right.

Then my next point is that he was illegally classified from Class I-O to Class I-A on November 20, 1952.

The Court: What page is that? Or is it only on the summary sheet?

Mr. Tietz: The summary sheet shows what they did, but there is no basis in fact for a change or for reclassification. The summary sheet, the initial minutes of action on page 11 indicate that they just

went ahead and did it. It doesn't show any basis at all for going ahead and doing it.

Now, the intervening things afford no basis whatsoever that he was physically acceptable. That doesn't mean that they can take him out of I-O. He has to be in good physical shape to do the I-O work. There is nothing in there that affords a basis in fact for the change from March 1st, 1952, to November 20, 1952, I-A.

I heard an argument on a similar point this morning. I have got some cases which your Honor might wish to review, which indicate that they can't change without facts intervening. I have got four cases on the point.

The Court: All right. You set them forth in your brief and I will look at them.

What is your next point? [29]

Mr. Tietz: My next point is that he was illegally classified into Class 1-A-O December 19, 1952. My argument there is that all this evidence was that he was a conscientious objector, and they just pick out this 1-A-O as a sort of bargaining thing and give it to him to see if he will take it.

There is no evidence to support the 1-A-O. The evidence was on the 1-O.

The Court: You can develop that. I think you had better develop the whole matter by brief, because you will have to make references to the exhibit, to the file, and the Government will want a chance to answer your contentions.

Do you offer Exhibit 1 in evidence, Mr. Real? I thought we stipulated on that.

Mr. Real: I will ask that the Government be able to withdraw Government's Exhibit 1, and have some photos made of Government's Exhibit 1, so we can return it to Mr. Crotty's file.

Mr. Tietz: No objection.

The Court: You may do that, and then substitute it.

(The document referred to, marked Plaintiff's Exhibit 1, for identification, was received in evidence.)

The Court: Did you make a motion for judgment of acquittal?

Mr. Tietz: Yes. [30]

The Clerk: There has been no motion made yet in the record.

The Court: You didn't make one; you told me what your points were.

May it be stipulated that at the conclusion of your case, the Government's case and your case, you make the motion for judgment of acquittal upon all the grounds that you set forth?

Mr. Tietz: Yes. Will the Government so stipulate?

Mr. Real: Yes, it may be so stipulated.

The Court: Somewhere along the line you have rested, I take it.

Mr. Tietz: Yes.

The Court: All right.

I will give you the same period of time in this case that I gave you in the other one. You file your

By the way, if this case goes up on appeal I want my remarks stated for the benefit of the Circuit.

Now, in a recent case, and I couldn't find it to give you the name of it, but you have probably seen it, Judge Stephens has held that where there was an error in a classification involving a previous classification, which had the effect of extending the matter beyond the particular age involved, that that matter could be inquired into. You probably know the name of the case, Mr. Tietz.

Mr. Tietz: Talcott. A habeas corpus case.

The Court: It just came down recently.

Mr. Tietz: I believe my case of Talcott was the one.

The Court: So the question is, was there error in classifying this defendant IV-F, as he was classified, I think, in February of 1949?

Now, at that time there was a regulation. I don't have the number of it, but it is very similar to 1623.2, the present regulation, which required the board to start at the bottom and consider each classification. Defendant claims that he was entitled to a classification of——

Mr. Tietz: IV-D.

The Court: ——IV-D, on the basis of being a student for [35] the ministry.

Mr. Tietz: Full-time student, yes, sir.

The Court: There was evidence in the file, first in one of the documents filed by the registrant, that he had been rejected by the Air Corps for some physical condition, which was confirmed by the sheet that came in that is now page 13 of the file.

There was, therefore, sufficient evidence—there was a basis in fact for the board to have given him the class IV-F, and therefore never reached the classification IV-D. The registrant claims there was not such sufficient basis in fact and talks about the board should have sent him for an examination, and that sort of thing. But the court finds that that point is not good; that there was a basis in fact, and that the defendant registrant acquiesced in that classification. There is no appeal from it.

Secondly, the file went to the Hearing Officer of the Department of Justice for a hearing and advisory recommendation. The defendant did not keep in touch with his draft board. He testified in this court that it was his own fault. He neglected to tell the board where he could be reached. So when the notice was sent for him to appear for this hearing he didn't get the notice.

The court thinks it is entirely within the discretion of the board, within the purview of the law, that the hearing go on in his absence, and the Hearing Officer did consider [36] those matters that were in the file. The Hearing Officer found—this man, incidentally, was classified I-A-O, as a noncombatant who was opposed to taking human life, but was eligible to serve in the Armed Forces, and his violation concerns refusal to accept orders to appear for induction for those purposes. The defendant argues there is no evidence in the draft board file that this man was willing to do noncombatant activities or work required of a registrant in I-A-O. I don't so read the draft board file. The man was employed in

a defense plant, a plant that had, if I recall, contracts with the Air Force. The Hearing Officer's report says—page 49—"It also appear that registrant was working on material on a sub-contract for the Air Force and Navy. A plant official expressed the belief that the registrant was aware of the nature of this work."

Whether the plant official so expressed the view, or not, I think it is obvious that anybody that has any practical experience at all of how defense contracts are worked out, that no man could work on one of those contracts without knowing that he was working on a Government contract. The job orders go around that it is a Government contract, and it is generally indicated all over the place. And the inference is clear that the defendant knew he was performing that kind of work. If he, therefore, was willing to work on those jobs, assuming that he was conscientiously opposed to taking human [37] life, it seems to me it was proper to classify him I-A-O and order him inducted into the Army as a noncombatant. And that is what was done, and I find a basis in fact and no error.

Do you have any comments, Mr. Tietz?

Mr. Tietz: I haven't heard the court make a comment on the third point.

The Court: What point is that?

Mr. Tietz: Reclassified from class I-O to class I-A.

The Court: I can't see that that point had anything to do with it at all. It is something that hap-

pened in the past. At one time he had been classified I-O, and it went ahead and the board classified him I-A; that thereafter other classifications came along and superseded that. The Government is not relying for this prosecution on that classification. There is no showing that that change from I-O to I-A in any way has any bearing on the present classification of I-A-O.

Mr. Tietz: This could be said on that point:——

I don't recall now whether I did spell it out in my brief, my two briefs.

A registrant is entitled to a fair deal at every step of the proceeding. Now, if he had stayed in the I-O for but a little longer, he would have been confronted with the processing that they were all being given then. It is a matter that [38] the court can take judicial notice of, of being offered the opportunity to take certain civilian jobs. Then he could have been in civilian work, which is what he wanted. But he was taken out of that, as I say, illegally. If he was taken out of there illegally, then he has been prejudiced.

The Court: I don't follow you on that. Supposing a man, however, was not given a fair deal by a board, that somewhere in the past they make an erroneous classification, and later on he then is properly classified, is that going to taint all the proceedings thereafter? Are we going to have to take the Selective Service file out and burn up everything that went on before, start all over again and reregister the man?

It seems to me if you show any procedural error.

you have got to show some causal connection between that error and the man's present situation of being a defendant here in the courtroom. And I don't find that connection.

Mr. Tietz: I argued a moment ago that he was prejudiced in the way that I described. That is a problem that has confronted the Ninth Circuit indirectly in this way: it has been argued many times by the various United States Attorneys that the final classification supersedes all the preceding classifications and cures all the defects.

Well, the first half of that is unquestionably true.

The Court: I understand the law there, and I agree [39] there are situations. Supposing a man asks for a personal appearance and never gets it, obviously the succeeding classification would not cure that procedural error. But if somewhere along the line he was given his personal hearing and then was classified, then the fact that previously in the file he had asked for a personal hearing and didn't get it is out the window. There is no causal connection between the present classification resulting from the personal hearing and the previous one that was affected with the procedural error. But I can't see here that because he may have been classified one way or the other sometime in the past, and thereafter another classification is made, that it can mean anything but we must look to the other classifications and see if they hold up.

Mr. Tietz: It seems to me that same reasoning could apply to the first point I made, that he was classified IV-F without a basis in fact, because he

hadn't been given any physical examination. As soon as he was given a physical examination it showed he shouldn't have been in IV-F. If I was right on that, which the court found I wasn't, because the court believes there was a basis for the 1945 finding.

The Court: And the defendant's statement.

Mr. Tietz: It is all very much in the past. The board should concern itself, and the law charges them to concern themselves with the current status. If I had been right on [40] that, then I still wouldn't be able to use it, according to the present reasoning, because he had been classified later in I-A-O, which——

The Court: No. That would come within this exception. I think you mentioned the Talbot case, or whatever it was, Talcott, or Talbot.

Mr. Tietz: Talcott.

The Court: There if you could show the action by the board had the effect of extending the period of time in which he might be eligible for the draft, or something like that, you would have a causal connection. If your point is good on that first matter about the 4-F classification, then I am convinced under the case that we have just referred to that his period of eligibility for service was extended, and therefore there had been error. But I am not convinced of the first premise, namely, that there was anything wrong in the classification.

Mr. Tietz: Did the court give any weight to the argument that I made that he couldn't appeal from the IV-F, and therefore he was stuck with it im-

properly, without an examination? If he could have appealed and didn't appeal, then he would be at fault. Not being able to appeal for the IV-D I think it puts him in the same position where Talcott was.

The Court: Well, I don't agree. I think there was a basis in fact, and that is all I am required to look to. The [41] board obeyed orders and they started in with the bottom classification, and when they got to IV-F they thought he belonged there and put him in there. I think they had that right. Subsequently when there was more information before the board a different action was taken. From what they had before them I think they had a basis in fact.

The court finds the defendant guilty and waives the probation report.

Is there any reason why the defendant should not be immediately sentenced?

Mr. Tietz: I will repeat, without going into the words of the application I made for the previous defendant, and ask for one week's continuance for the purpose of sentencing.

The Court: How long has this been pending? It was back in February, 1949.

Mr. Tietz: The defendant has whispered to me that it might be said to date back to 1945, because he was a registrant in the last war.

The summary of the minutes, though, doesn't contain the least bit of delay, through either litigation——

The Court: No, I don't find it here. Apparently

his first order to report for induction was in '54. Is that right?

Mr. Tietz: I believe so.

The Court: I will put the matter over, if you want, one [42] week, to December 20th, at 2:00 o'clock for sentence.

Mr. Tietz: Yes, sir.

The Court: Also be prepared, as in the other case, to give a concise statement of what you contend to be the precise question of law, if you make an application for bail. The 20th at 2:00 o'clock.

Just because I don't agree with your position doesn't mean that you haven't done an able job in analyzing this file and preparing your record and preserving your record. That is probably small consolation to you.

Mr. Tietz: I would think that your Honor might express now, after having read these comparatively lengthy briefs, whether your Honor at this stage believes that there are substantial points that would justify an Appellate decision.

The Court: I doubt it.

Mr. Tietz: I will be ready, then, if the defendants desire.

The Court: He may remain on bond.

(Whereupon the hearing in the above-entitled matter was continued to December 20, 1954, at 2:00 o'clock p.m.) [43]

Monday, December 20, 1954, 2:00 P.M.

(Other court matters.)

The Clerk: No. 29 on the calendar. 23911 Criminal, United States v. Nick John Kaline, for hearing motion for judgment of acquittal and for a new trial, and for sentencing.

The Court: The record will show the defendant present with his counsel.

This is another Selective Service case in which I waived a probation report. This defendant was classified as I-A-O, available for noncombatant service in the Armed Forces. Mr. Tietz has filed a renewal of a motion for judgment of acquittal, and an alternate motion for a new trial.

Mr. Tietz: Your Honor, on the motion for new trial I have certain things to say that might sit well with your Honor, in that I will be commenting on some cases that weren't available.

(At this point there was further discussion between court and counsel, which discussion was reported by the court reporter, but not transcribed at the request of counsel.)

Mr. Tietz: The main thing I am trying to do is establish that there is a reasonable ground for my argument, and if the court should feel that there is a point here that the Court [45] of Appeals should decide, then I won't have to repeat it.

The Court: I don't think there is. Motion for judgment of acquittal and motion for a new trial are denied.

Do you have a notice of appeal ready?

Mr. Tietz: Yes, sir.

The Court: Is the defendant ready for sentence?

Mr. Tietz: Yes, he is. Well, I would like to be heard.

The Court: I have waived a probation report in this matter.

Mr. Tietz: May I be heard before your Honor passes sentence?

The Court: Yes.

Mr. Tietz: I am not going to repeat the arguments that I made in the past, years ago or just a few minutes ago, but I do have some things to say about this particular defendant that makes him different from the others. There is a good reason in his file why he particularly should have a chance by this court, as a condition of probation, to do I-O work, and then there is also a good personal——

The Court: Mr. Kaline, would you go into the Army as a private and perform noncombatant work pursuant to this order that you got from your Local Board?

The Defendant: No, your Honor.

The Court: I am not going to talk about other classifications. I can't change a draft board's classification. [46] This board gave him I-A-O, noncombatant under military direction. He said he wouldn't do it even if we gave him a chance now, so why talk about what will happen under a I-O classification?

Mr. Tietz: Only for this reason. The Local Board gave him on two occasions—gave him the I-O. He should have a chance to do I-O work. That is

the only reason. I didn't make this argument in the first case because that was an I-A case. But this man had been given it, and I argued during the trial—I won't repeat it—that it was taken away from him illegally. Here is a fellow that should for that reason be given a chance by the court to do it.

I might add that there is a personal reason why your Honor should give a little weight to it. His wife is in her six and a half month of pregnancy. Once before she lost a child.

This was told me not by him, but his minister who is sitting in court here today. She is an orphan. He is holding two jobs now, a regular job and a parking lot job. If your Honor gave him the chance to do I-O work he would do the I-O work. He would supplement his income, because that is only about two hundred a month. They run from $180 to $210, depending on the place. He would keep on with his second job. He is able to do it. He has got the physique for it. He would keep his wife off relief, the country would get some [47] good out of him, and he had that classification.

He isn't a I-A-O type; he is the I-O type. I think this is one case where your Honor should consider a probationary sentence.

The Court: Mr. Tietz, I have been over this file, and I can't disregard the classification that has been given. It is not my job to supplant the draft board's classification with my own judgment.

Mr. Tietz: There is a manifest injustice. The court found him guilty. The court calls them as he sees them. But this is another matter. What is to

be done to this fellow with relation to society and his family? A probationary sentence, just like in the cases of these other fellows who committed all sorts of offenses. It is better to have them out working——

The Court: We don't cross the bridge of what would happen if he got an I-O classification. I don't want to go into it. I don't know what would happen. Maybe he would work and maybe he wouldn't.

I have had them up here classified I-O and they came in the same way.

Mr. Tietz: Exactly, and they are different. I think the court could do this: The court could give him a five-year penitentiary sentence, and if he didn't do his work, didn't do this civilian work as directed, he would be right back. [48]

The Court: That is putting me in the place of sitting on the draft board as an appeal agent overruling their decision.

Mr. Tietz: Every judge of this court during the hot part of World War II did it. Your Honor did it in one case.

The Court: I am ready to pass sentence.

Mr. Tietz: We have no legal reason why sentence shouldn't be pronounced at this time.

The Court: It is the judgment of the court that the defendant be sentenced to the custody of the Attorney General for imprisonment for the period of four years.

Do you have a notice of appeal to file?

Mr. Tietz: Yes, sir. I am also filing with the

clerk, your Honor, in duplicate an application for bail on appeal.

The Court: Is your application for bail on appeal based on the same grounds as the matters heretofore discussed at the trial and on the motion for judgment of acquittal, and motion for new trial?

Mr. Tietz: Yes. And upon my further statement that I, as his counsel, feel that he has good grounds for taking the appeal, and a good chance to interest the Court of Appeals.

The Court: All the grounds that you urged at the trial in the motion, and on the motion for a new trial, and the motion for judgment of acquittal may be considered as having been urged. [49]

Mr. Tietz: Merely as a point of substantial basis. I don't disagree with your Honor, no, your Honor made a decision, but I am saying that there is a substantial basis for letting him go to the Court of Appeals to have them decide and pass judgment on whether your Honor is correct or not.

The Court: Motion for bail on appeal is denied.

Mr. Tietz: May he have a——

The Court: Bail exonerated and the defendant remanded to custody.

Mr. Tietz: I was going to ask that he have a few days, anyway, to discuss the possibilities of appeal with me.

The Court: Mr. Tietz, this matter came up for sentence, if I recall, a week ago, and I put it over a week at your request. Is that right?

Mr. Tietz: Correct.

The Court: All right.

Mr. Tietz: It is a request. I have no right to insist on it.

The Court: All right. Bond exonerated; the defendant committed.

[Endorsed]: Filed December 31, 1954. [50]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 17, inclusive, contain the original Indictment; Stipulation; Motion for Judgment of Acquittal; Renewal of Motion for Judgment of Acquittal; Judgment and Commitment; Notice of Appeal and Designation of Record on Appeal and a full, true and correct copy of Minutes of the Court for November 15 and December 20, 1954, which, together with the reporter's transcript and the original exhibits, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 29th day of December, A.D. 1954.

[Seal] EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 14635. United States Court of Appeals for the Ninth Circuit. Nick John Kaline, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed January 3, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

The United States Court of Appeals
for the Ninth Circuit

No. 14635

At a Stated Term, to wit: The October Term, 1954, of the United States Court of Appeals for the Ninth Circuit, held in the Courtroom thereof, in the City of Los Angeles, in the State of California, on Monday the third day of January, in the year of our Lord one thousand nine hundred and fifty-five.

Present: Honorable Albert Lee Stephens, Circuit Judge, Presiding;

Honorable James Alger Fee,
Circuit Judge;

Honorable Richard H. Chambers,
Circuit Judge.

NICK JOHN KALINE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ORDER SUBMITTING AND DENYING MOTION FOR BAIL

Ordered motion of Appellant for admission to bail pending appeal presented by Mr. J. B. Tietz, counsel for the Appellant, and by Mr. Cecil Hicks,

Jr., Assistant U. S. Attorney, counsel for the Appellee in opposition thereto, and submitted to the court for consideration and decision.

Upon consideration thereof, It Is Further Ordered that said motion be, and hereby is denied.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Appellant will rely upon the following points in the prosecution of his appeal from the judgment entered in the above-entitled cause.

I.

Defendant's liability for service has illegally extended beyond age 26 on February 17, 1949, and he was illegally deprived of a Class IV-D "Exempt" Classification on said date.

II.

The Classification of I-A-O given the defendant by the appeal board was contrary to law and without basis in fact.

III.

Since the regulations forbade defendant the benefit of counsel at his appearance before local board on December 19, 1952, the defendant was entitled in this court, to a trial de novo on the issues of the claimed classifications.

IV.

Defendant was denied due process in that the local board failed to have available an advisor to registrants and to have posted conspicuously or any place, the names and addresses of such advisor, as required by the regulations, and to the defendant's prejudice.

V.

The Department of Justice deprived defendant of his right to a fair and correct recommendation to the appeal board in that the department's recommendation was based on artificial and illegal considerations.

VI.

The Hearing Officer of the Department of Justice abused his discretion when he failed to give defendant another opportunity for a hearing after defendant had promptly explained why he didn't appear on February 4, 1954, at 3:30 p.m., and after defendant had requested another opportunity to be heard by said Hearing Officer.

VII.

The undisputed evidence shows that the defendant was deprived of a fair hearing before the hearing officer of the Department of Justice in that the conclusions of both the Hearing Officer and the Attorney General are inconsistent with and not supported by the findings of fact.

VIII.

The failure of the court to compel the production of the F.B.I. investigative report and the report of

Hearing Officer to the Attorney General and the order of the court sustaining the motion to quash the subpoena duces tecum made by the Government, constitute a deprivation of the defendant's rights to due process of law upon criminal trials contrary to the Fifth Amendment to the United States Constitution and the right to confrontation guaranteed by the Sixth Amendment, and also violate the statutes and rules of the court providing for the issuance of subpoenas in behalf of defendants in criminal cases.

IX.

The denial of the conscientious objector status by the Selective Service System and the recommendation by the Hearing Officer of the Department of Justice and by the Department of Justice to the board of appeal were without basis in fact, arbitrary, capricious and contrary to law.

/s/ J. B. TIETZ.

[Endorsed]: Filed February 1, 1955.